NO. 22311

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON BERT CRAFT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

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APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On November 22, 1966, the federal grand jury for the Southern District of California returned a three-count indictment (No. 172-SD) charging Larry L. Wolfe and Eleanor Rebecca Orman in Count One with a violation of Title 21, United States Code, Section 176(a) (illegal importation of marihuana) and charging Steven Roy Horn and appellant with a violation of Title 21, United States Code, Section 176(a) (illegal importation of marihuana) through a violation of Title 18, United States Code, Section 2 (aiding and abetting the illegal importation of marihuana). Count Two charged Larry L. Wolfe, Eleanor Rebecca Orman, Steve Roy Horn and appellant with a violation of Title 21,

United States Code, Section 176(a) (concealment and transportation of illegally imported marihuana). Count Three charged Larry L. Wolfe, Eleanor Rebecca Orman, Steve Roy Horn and appellant with a violation of Title 18, United States Code, Section 545 (illegal importation of merchandise). Transcript of Record, Vol. 1, pp. 2-4.

On May 18, 1967 a trial by jury commenced as to appellant and defendant Steve Roy Horn. On May 22, 1967 the jury returned a verdict of guilty on each count as to both appellant and Steve Roy Horn. Id. at 5.

On June 19, 1967 appellant was sentenced by the Honorable James M. Carter to a 5-year period of incarceration on each count concurrently, and pursuant to Title 18, United States Code, Section 4208(a)(2), and further recommended that the place of confinement of appellant be designated by the Attorney General to be the State Institution where appellant was confined at that time. Id. at 6. A timely Notice of Appeal was filed by appellant. Id. at 7.

The offenses occurred in the Southern District of California, and jurisdiction of the United States District Court for the Southern District of California was based on Title 21, United States Code, Section 176(a), and on Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as

follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . ."

Title 18, United States Code, Section 545, reads in pertinent part as follows:

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --

Shall be fined not more than $10,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Was testimony that a vehicle similar to the one in which the contraband was found on "lookout" inadmissible hearsay, and prejudicial to appellant who was not in the vehicle at the time of the search of the vehicle?
2. Were the exculpatory statements, later shown to be false, made by appellant to Customs Agent Thaine Ellis taken in violation of Miranda?

3. Was the testimony relating to appellant's prior sale of dangerous drugs admissible?

4. Was the testimony of appellant's prior use of marihuana inadmissible?

5. Was the testimony of appellant's having smuggled dangerous drugs into the United States from Mexico inadmissible?

6. Was the introduction into evidence by appellant of his prior felony conviction error?

7. Was the evidence sufficient to sustain the verdict as to appellant?

A. Statement of the Facts

On October 16, 1966, Immigrant Inspector Tom Acuna was on duty inspecting vehicular traffic entering the United States from Mexico at the Port of Entry, San Ysidro (San Diego), California at approximately 3:45 a.m. At that time and place, Larry Wolfe and Eleanor Rebecca Orman entered the United States from Mexico in a red 1961 Ford, with a license number of OAE-731. Acuna had a"lookout" list containing the license number OEA-731, so he referred the vehicle to the secondary inspection area for further inspection. Reporter's Transcript, pp. 16-17 (hereinafter referred to as R.T.).

On October 16, 1966, Customs Inspector Claude L. Yates was on duty inspecting pedestrian traffic entering the United States from Mexico at the Port of Entry, San Ysidro (San Diego), California at approximately 3:40 a.m. At that time and place, he observed appellant enter the United States from

Mexico. Appellant was nervous, id. at 20, and Yates thought it "unusual" for an American to be entering at that hour. Appellant stated to Yates he had been with some friends, and had become separated from them, and was returning home on foot.

Four or five pedestrians later Yates observed Horn entered the United States from Mexico. He also was nervous and under quite a bit of tension. Id. at 21. He also stated that he had been with friends in Mexico in a car, and had become separated from them. Id. at 19-22.

On October 16, 1966 Customs Inspector Robert L. Lasher was on duty at the secondary inspection area at the Port of Entry, San Ysidro (San Diego), California inspecting vehicles referred to that area for further inspection. At approximately 3:50 a.m. a red 1951 Ford Fairlane arrived at that area with Wolfe and Orman as passengers. A slip on the car indicated that the car was similar to one on"lookout." Lasher checked the license number and description of the vehicle in question with the"lookout"book, and determined sufficient similarity existed to warrant a further search. The checking the license number and description of the subject vehicle with the lookout book was evidence admitted without any objection. Id. at 30.

Lasher found three bricks of marihuana and three switch-blade knives under the back seat of the vehicle. Id. at 28-31.

On October 16, 1966 Customs Agent Thaine Ellis was on duty at the Port of Entry, San Ysidro (San Diego), California in the early morning. At that time and in that place, Wolfe pointed out appellant and Horn to Agent Ellis. Ellis

intercepted appellant and Horn near the Greyhound Bus Station in San Ysidro, and returned them to the Port of Entry. He advised appellant that he did not have to make any statement to him; that any statement he did make could be used hereafter against him in any court proceedings; that he was entitled to an attorney during that interrogation or any subsequent interrogation; and that if he could not afford an attorney, the government would appoint one for him. Id. at 37.

After being so advised, appellant denied knowing Wolfe, said that he had never seen Wolfe. Id. at 38. Later, appellant admitted knowing Wolfe. Id. Appellant also admitted traveling from Los Angeles to Mexico with Wolfe, and having departed from Wolfe's automobile prior to its entry back into the United States from Mexico. Id. at 39. Appellant had previously denied knowing Wolfe and/or Orman twice. Id. at 42.

Larry Wolfe, a co-defendant, testified on behalf of the government. Wolfe and appellant worked at the same company, id. at 54, and Wolfe had known appellant for about a week. Id. at 54, 70. In the middle of October, 1966, appellant, Horn, Wolfe and Orman decided to take a trip to Mexico. Id. at 57-58. The purpose of the trip was for appellant to purchase some amphetamine sulphate tablets for Wolfe, and some stag movies, and a false driver's license for Orman. Id. at 58. Wolfe wanted some "bennies" to keep him awake, id. at 56, as he was working two jobs, and needed the pills to keep him awake. Id. at 55. Appellant had previously sold Wolfe a "roll of whites," id. at 56, said sale occurring within a week of the trip to Mexico,

as that period of time marked the entire relationship between Wolfe and appellant. Id. at 54,70.

All four parties travelled to Mexico, and appellant and Horn left Wolfe's and Orman's presence to secure the contraband. Id. at 57, 59. Wolfe and Orman gave appellant money for this purpose. Id. at 59. After a period of time, about an hour, id. at 60, appellant and Horn returned and appellant indicated that he had the "stuff." Id. at 61. The four parties returned to the vehicle, and entered it and started for the border. Id. at 63. Appellant and Horn exited the vehicle about three blocks from the border, id. at 65, appellant indicating that it would not look as suspicious. Id. at 64. Appellant stated that he and Horn would meet Wolfe and Orman at Oscar's on the American side of the border. Id. at 65.

Wolfe testified that he had seen or heard that appellant used marihuana, such as smoking. Id. at 66.

Wolfe further testified that he had observed appellant remove pills from the coat that he had worn to Mexico, and swallow some himself, and give some to Horn who swallowed them also. Id. at 67-68. This event occurred the day that Wolfe, Horn and appellant were released from custody, the day after the arrest. Id. at 66. Appellant stated on that occasion that "the Customs officer was kind of stupid because he [appellant] got by him with having some pills in his coat and they didn't catch him with the pills." Id. at 69.

Wolfe further testified that appellant had told him that they would "get

ne later" if he said anything. Id. at 52. When Wolfe and appellant were at he jail after they had been arrested, appellant told Wolfe if all male parties estified against Orman, the males would "get out easier." Id. at 54.

Orman testified also the same facts regarding the trip to Mexico, and the events that occurred there up to the time that she and Wolfe were apprehended entering the United States from Mexico. Id. at 87-99.

IV.

ARGUMENT

A. THE TESTIMONY REGARDING A "LOOKOUT" WAS NOT HEARSAY, WAS RELEVANT, AND WAS CERTAINLY NOT PREJUDICIAL.

The references in the testimony of Acuna and Lasher to the fact that the vehicle in question had a license number similar to, but not coincidental with, a license number which was on "lookout" was not hearsay. A witness is permitted to testify as to the things he did and observed. Thus, if a witness made a phone call, and testifies that he inquired on a specific matter ("What is the telephone number of Joe's Bar?"), and then testifies that he wrote down on a piece of paper certain figures ("After the other party said something, I wrote down '298-5478.'"), it is reasonable to infer that the text of the statement of the other party related to what the witness wrote down. Drawing that conclusion does not prevent the witness from testifying as to what he said and did. There has been no testimony directly on any extrajudicial statement by anyone.

Appellant cites no authority to support his proposition that this evidence

is hearsay and inadmissible as such.

Second, the evidence was that the number on the "lookout" list was not exactly as the number of the vehicle in question. The letters before the numerals on the "lookout" were "OEA" and the vehicle's were "OAE." Id. at 17. Both Acuna and Lasher testified as to the similarity, id. at 17, 30, and that the similarity was the cause for a further search of the vehicle. Id. The similarity did justify the further search, but the dissimilarity establishes the absence of any prejudice to appellant. The matter was relevant to explain why the vehicle was pulled over for further customs inspection. However, because the "lookout" referred to a different license, the testimony relating to the "lookout" was not prejudicial. The jury could have inferred that another vehicle was in fact involved, but it was pure chance that this similar number was pulled over and contraband found. An honest mistake by the customs officials resulting in the discovery of contraband cannot fairly be objected to in explaining the search of that car.

Moreover, appellant was not in the vehicle when it was stopped because of its similarity to the "lookout" number. Id. at 20. Appellant's involvement came upon Wolfe's identification of appellant to Agent Ellis. Id. at 35. There is no direct causal relationship between the "lookout" and appellant. Only the independent intervening force of Wolfe resulted in appellant's apprehension. Therefore, appellant cannot complain of the evidence relating to the "lookout."

Appellant argues that effect of mentioning the "lookout" was the "implication that contraband was believed by an undisclosed informant to be in this

utomobile." Appellant's Brief, p. 14. As suggested above, the dissimilarity makes for inferences which do not support any claim of prejudice, but merely a matter of fortune.

There was considerable evidence that appellant was responsible for the presence of the contraband in the car. Wolfe and Orman testified that appellant indicated that he secured the "stuff" in Mexico, R.T., pp. 61, 95. Appellant solely had the keys to the car and the parking ticket in Mexico, id. at 59, 62. Whatever effect the testimony regarding the "lookout" might have had to indicate contraband was in the car was merely cumulative, and thus not prejudicial.

Finally, appellant had the opportunity to vitiate any harmful inference that might have attached from the testimony regarding a "lookout." In a discussion out of the presence of the jury, appellant's counsel stated he was "considering the possibility of introducing [evidence through] Agent Ellis [as] to that lookout, which would have an exonerating effect." Id. at 122. He added that he realized "the dangers in doing this; . . . ." Id. To this suggestion, the government indicated its willingness to stipulate that "an unnamed informant . . . observed the car bearing a similar license number go to a known dope peddler in Tijuana and that at that time the car was observed being driven by two young Mexican males within two hours of when this car crossed the border." Id. at 123. To this suggested stipulation, counsel for appellant said "that would probably do it, your Honor. This waives the first person I would call to testify." Id. Although appellant's counsel did not commit himself to use of

this stipulation, he understood that it would be available to him. Id. at 123-24.

Thus, appellee offered appellant the opportunity to vitiate any claimed prejudicial effect of the testimony relating to a "lookout" by offering a stipulation that appellant was never seen in or near the car, whose license number was on "lookout" when that information was secured. In fact, the stipulation implicated other unknown parties, and had, as counsel for appellant realized, an "exonerating" aspect for appellant. However, as the record indicates, appellant, for unknown reasons relating to strategy of trying the case, elected not to take advantage of the generous offer by appellee. It is quite difficult for appellee to visualize the nature of appellant's complaint on appeal on this matter in view of what occurred in the trial court.

Appellant cites only one case on this question, that is Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961) in support of his position. Sanchez is clearly distinguishable. That case is replete with quotations from the record indicating the clearly inadmissible hearsay testimony. All of the objectionable testimony related to testimony by a witness of what other people said, their actual extrajudicial statements. Id. at 262-65. The facts there are most distinguishable from those here, in which there was no testimony as to the nature of the information received resulting in the placing of a vehicle on "lookout."

B. STATEMENTS MADE BY APPELLANT AFTER BEING ADVISED OF HIS CONSTITUTIONAL RIGHTS WERE NOT MADE IN VIOLATION OF MIRANDA.

Appellant first argues that there is no showing the appellant "voluntarily, understandingly and intelligently waives his constitutional protection against self-incrimination and his right to have counsel present at this interview." Appellant's Brief, pp. 15, 17. The record is clear to the contrary. At the Port of Entry, appellant was orally advised as follows:

> "Do you understand your Constitutional rights? . . . I want to explain those to you. You don't have to make any statement to me. Any statement you do make can be used hereafter against you in any court proceedings. You are also entitled to an attorney. [Sic.] [D]uring this conversation or during any other interrogation[.] [I]f you can't afford an attorney, the government will appoint one for you." R.T., p. 5.

Furthermore, appellant was given a document which he signed. Id. at 6. This document was admitted into evidence on motion of appellant. Id. at 191. The document read as follows:

> "We are investigating marihuana smuggling. You do not have to make any statement or answer any questions. Any statement you make could be used against you in a court of law. You have a right to remain silent. Do you understand what I have told you? You have the right to consult with an attorney before making any

statement or answering any questions. You have the right to have an attorney present with you during the making of any statement or the answering of any questions. Do you want counsel, or are you willing to give up your right to remain silent and talk to us without consulting a lawyer and having one present during the making of your statement?" Id. at 6-7.

Appellant signed this document. Id. at 7. Appellant said that he understood what had been told to him in response to those questions in the document, first by so stating, and the second time by nodding his head affirmatively. Id. at 10-11.

Appellant himself acknowledged on cross-examination that he read the document and signed it. Id. at 181.

Bell v. United States, 382 F.2d 985 (9th Cir. 1967) settles the issue of the waiver of the rights adversely to appellant. In that case, defendant was given written advice as to his rights. He was not given oral advice. In response to the argument that defendant should have been given oral advice, the court said at 987:

"This is absurd. If appellant read and understood the written advice, then he acquired knowledge of his rights in a very satisfactory way. There is no requirement as to the precise manner in which police communicate the required warnings to one suspected of crime. The requirement is that the police fully advise such a person of his rights, and appellant made no showing

that he did not read or understand the written warnings which were presented to him."

Appellant in the case at bar made no showing that he did not read or understand his rights. In fact, the contrary is true. He said that he did read and understand them. Moreover, the present case is stronger because appellant had the benefit of both oral and written communications, and not just written as in Bell.

Next, appellant argues that the Miranda warning as given was defective because appellant was not advised that the statements he might make "will be used" against him. Appellant's Brief, p. 18. The language actually used was that the statements made "can be used hereafter against you in any court proceedings," R.T., p.5, and "could be used against you in a court of law." Id. at 6. Appellee submits that the issue should not turn on the semantics of the situation. The question is whether or not appellant understood that statements he made would in the future be used to his disadvantage and detriment in a legal proceeding. It is submitted that the language used grammatically referred to the future, and left no uncertainty as to the consequences of his making statements at that time.

To the benefit of appellant, the court instructed the jury that it should view oral admissions and incriminating statements made out of court with caution and weighed with great care. Id. at 210, 214. The court instructed the jury to determine if the statements were "voluntarily and understandingly" made. Id. at 210-211. Finally the court instructed the jury to consider the

statements made only after they found that he had been informed on his constitutional rights as outlined in Miranda, including that he knew that "anything he said could be used against him, ..." Id. at 213. The jury was instructed to find that appellant knowingly and understandingly waived his right to have an attorney present at the interview before the jury could consider the statements made. Id. at 213-14.

C. TESTIMONY OF APPELLANT'S PRIOR ACTIVITIES INVOLVING BENZADRINE, MARIHUANA AND OTHER UNIDENTIFIED PILLS WAS RELEVANT, AND THE TRIAL JUDGE'S EXERCISE OF HIS DISCRETION AS TO THE RELEVANCY AGAINST ANY PREJUDICE SHOULD NOT BE DISTURBED.

Appellant accepts the statement of law cited by appellant, that evidence of offenses or misconduct not charged in the indictment is inadmissible unless relevant. Appellant's Brief, pp. 20-21. Appellee also accepts the proposition that the relevancy of the evidence is to be weighed in its probative value against its prejudicial effect. Id. at 21. Appellee further contends that the trial court's determination on the issue is one within his discretion, and the exercise of that discretion should not be reversed on appeal unless clarly erroneous. Rule 52(a), Federal Rules of Criminal Procedure. See e.g., Banning v. United States, 130 F.2d 330 (6th Cir. 1942).

1. Previous Sale of Benzadrine

Appellant blandly states that "the Government did not specify its purpose

in introducing this evidence." Appellant's Brief, p. 21. The record is clear that the purpose of introducing that evidence went to the issue of "intent to defraud," an essential element of the government's case. The trial court noted in its instructions that this element was necessary to prove each count of the indictment. R.T., pp. 219, 220, 221. The court also rendered an instruction of the meaning of "intent to defraud." Id. at 221-22.

In establishing the "intent to defraud" element, it was necessary to prove that appellant had such an intent. Proof came first from the fact that the purpose of the trip to Mexico was to purchase amphetamine sulphate tablets, and smuggle them into the United States from Mexico with an "intent to defraud." Id. at 58, 91. The reason behind Wolfe's desire for appellant to obtain some amphetamine sulphate tablets thus became important. Wolfe testified that he wanted them in order for him to stay awake on his job, as he was trying to work two jobs at the same time. Id. at 55, 56. He explained appellant's presence and purpose of the trip to Mexico to smuggle merchandise into the United States resulted from the fact that on a previous occasion, within one week before the trip, appellant revealed that he was a source of supply of such pills, as he had sold a "roll of whites" to Wolfe. Id. at 56.

Thus, the purpose of the trip to Mexico involved the essential element of "intent to defraud." The evidence was admitted to relevantly explain appellant's presence and participation in the venture. Because of the relevance of the evidence on the issue of the purpose of the trip to Mexico, appellee submits that the trial court's ruling that such evidence of prior misconduct was of sufficient probative value to outweigh its prejudicial effect should not be

disturbed as it is not clearly erroneous.

Furthermore, Count Three of the indictment charged appellant with smuggling merchandise into the United States from Mexico with "intent to defraud." The fact that pills were the stated merchandise, the evidence relating to the use of those pills was clearly admissible.

Appellant cites the case of Enriques v. United States, 314 F.2d 703 (9th Cir. 1963), as authority for holding this prior sale to be inadmissible. However, Enriques is distinguishable. Evidence of a prior use of marihuana was held erroneously admitted with regard to a charge of sale, concealment and transportation of heroin. However, there was no suggestion of any causal relationship between the incidents. In our case, the contrary is true. The explanation of appellant's presence in Mexico and his entry into the United States related to his "intent to defraud" the United States by smuggling contraband. The prior sale went to establish appellant's presence with Wolfe on the trip.

The relevancy of the prior sale is heightened by the evidence that appellant did in fact smuggle pills into the United States from Mexico at the time that he crossed the border, although this fact was undetected by the Customs officials at that time. R.T., pp. 67-69.

2. Concealment and Use of Unidentified Pills.

Appellant, upon his release from County Jail removed some pills from the coat which he had worn to Mexico, swallowed them, and stated that "the Customs officer was kind of stupid because he got by him having some pills

in his coat and they didn't catch him with the pills." Id. at 69.

Appellant only cites Enriques again to support a ban on that evidence. Its facts are obviously different. Here there are two counts of smuggling contraband into the United States and one count involving concealment and transportation of illegally imported contraband. All three counts involve "intent to defraud." Nothing could go more to that issue than appellant's admission of having participated in a simultaneous act,neither prior nor subsequent, of the exact same nature.

The comment regarding the Customs officer was not ambiguous in any sense. It related to evasion of the customs law, plain and simple.

3. Previous Association with Marihuana.

Interestingly enough, appellant states that "Wolfe testified in effect that appellant previously smoked marihuana." Appellant's Brief, p. 23. It is extremely important for this Court to know why appellant qualified this description of the testimony with the words "in effect." The reason is that the record does not reflect testimony that appellant had smoked marihuana in the past.

The whole colloquy which occurred at this point in the trial is set forth as follows:

"Mr. Milchen: Do you know of your own personal knowledge whether or not the defendant, Craft, has ever used marijuana,[sic.] of your own personal knowledge?

Mr. Reese: I object to that, that is irrelevant to this case.

The Court: Objection overruled.

Mr. Milchen: I asked you of your own personal knowledge what you have seen or heard?

Mr. Wolfe: Say that again.

Mr. Milchen: Have you ever seen or heard of anything of your own personal knowledge that Mr. Craft, the defendant, Craft, used marijuana [sic]; such as smoking?

Mr. Wolfe: Yes." R.T., p. 66.

Appellee went no further into the matter.

As is evident, it is unclear whether the affirmative response meant that Wolfe had seen appellant use marihuana or whether Wolfe had heard (which would be hearsay) that appellant used marihuana. If the response was the latter, the prior objection on the grounds of relevancy would not have preserved this point on appeal. Rule 18(2)(d), Rules of the Court of Appeals for the Ninth Circuit.

Assuming that the response related to use and that the objection preserved that point on appeal, appellee submits that the evidence was relevant to the case. Appellant was charged with "knowingly" smuggling marihuana into the United States, and "knowingly" transporting and concealing it in the United States. Appellant's not guilty plea put in issue the question of his knowledge of the marihuana. Appellant testified that Wolfe gave him the package

containing the marihuana prior to his departure from the vehicle. R.T., p. 141. Appellant "wondered what was in the package first." Id. He thought the package contained firecrackers. Id. at 142.

Appellant's prior use of marihuana went to the issue of whether or not he knew what was contained in those packages.

However, it is conceded that the prior use of marihuana was introduced in the government's case in chief, and not in rebuttal of appellant's testimony as to his lack of knowledge. Even so, appellee submits that the not guilty plea by appellant made the issue of his knowledge of the nature of marihuana a matter of importance, and evidence of such prior knowledge was relevant.

That the government had to prove knowledge is revealed by the instructions of the court on numerous occasions. Id. at 215, 216, 217, 219, 220, 221, 223.

The fact that appellant had previously used marihuana, and within one week of the smuggling venture (Wolfe had known appellant only one week prior to the trip. Id. at 54, 70) does logically suggest that appellant might resort to smuggling an amount of marihuana into the United States for his personal use. The marihuana in question was only three bricks, approximately seven pounds. Transcript of Record, Vol. I, pp. 2-3. The quantity of marihuana suggests that it was for personal use, and evidence of personal use would be relevant. This fact remains even though marihuana may be grown in the United States.

This fact is more relevant when viewed in light of the case cited by

appellant of Theobald v. United States, 371 F.2d 769 (9th Cir. 1967). There, evidence of a discussion about sale of marihuana was held admissible in connection with a charge of smuggling a commercial quantity of marihuana, to wit,44 pounds. In our case, the prior personal use would go to the issue of knowingly smuggling a quantity of seven pounds, a quantity for personal use. The amount provides as much relevant motive for smuggling here with the prior act as it did in Theobald and that prior act.

Appellee finally submits that the evidence in question was merely cumulative. Therefore, whatever prejudicial effect it might have had was rendered null. Any error as a result is harmless. Appellant admits the truth of this argument when he states as follows:

> "It is difficult to understand why it should have been necessary for the Government to attempt to establish knowledge on the part of the appellant, and absence of mistake, in connection with the importation of the marijuana [sic] here involved, if WOLFE'S and ORMAN'S testimony was to be believed. There was little necessity for additional proof of knowledge, intent to evade Customs laws, or absence of mistake, in view of WOLFE'S claim that appellant deliberately got out of the car for the purpose of reducing suspicion and earlier in the evening had commented on the problem of trusting a supplier with whom he was not acquainted." (Emphasis added.)
>
> Appellant's Brief, p. 27.

Appellee would agree whole-heartedly with appellant that the evidence

was merely cumulative. There is no doubt that the evidence must be viewed in the light most favorable to appellee. Viewing the evidence in such a light, the testimony of Wolfe and Orman is to be believed, and the evidence was cumulative, thus vitiating any prejudicial effect and being harmless.

D. INSTRUCTIONS CURED ANY ERROR RESULTING FROM ADMISSION INTO EVIDENCE OF ANY OF THE SIMILAR ACTS.

The court instructed the jury on the issue of similar acts as follows:

"Evidence that an act was done at one time or on one occasion is not any proof whatever that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any offense charged in the indictment.

"Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular acts charged in the particular count of the indictment then under deliberation.

"If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the acts charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature, in determining

the state of mind or intent with which the accused did the acts charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the particular count under determination, the accused acted willfully and with specific intent and not because of mistake or inadvertence [sic] or other innocent reason." R.T., pp. 214-15.

It is submitted that this instruction cured any prejudicial effect upon appellant from the introduction of evidence of the similar acts in question. The instruction gives the correct scope of consideration by the jury of the evidence. This instruction was not objected to by appellant, nor was any additional instruction offered on the subject.

E. THERE WAS NO ERROR IN THE INTRODUCTION BY APPELLANT OF HIS PRIOR FELONY CONVICTION.

Appellant introduced evidence in his case in chief to the effect that he had been previously convicted of a felony. Id. at 159. The simple fact of the prior felony conviction was the only fact in evidence. The nature of the conviction and its date were not introduced into evidence. Appellee never went into the matter on cross-examination. Id. at 160-193.

There is no authority to support the proposition that appellant can complain on appeal of matters he introduced into evidence, regardless of the

strategical reasons.

There is authority too numerous to require citation that the existence of a prior felony conviction, including even the date and nature of the conviction, can be used to impeach the accused.

The court, in the instructions, directed the jury to consider the prior felony conviction insofar as it related to the credibility of appellant, and not as evidence of guilt of the offense for which appellant was on trial. Id. at 211-12.

V.

CONCLUSION

Appellee respectfully submits that appellant's conviction should be affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joseph Milchen

JOSEPH A. MILCHEN